

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLUTION 86/2018

Precautionary Measure No. 1357-18

Persons with disabilities at the Judge Rotenberg Educational Center
regarding the United States of America
December 3, 2018

I. INTRODUCTION

1. On November, 13, 2018, the Inter-American Commission on Human Rights (“the Inter-American Commission,” “the Commission,” or “the IACHR”) received a request for precautionary measures filed by the non-governmental organizations Disability Rights International, The Association for Persons with Severe Handicaps, Mental Health Legal Advisors Committee and Disability Law Center (“the applicants”), urging the IACHR to request that the United States of America (“the State” or “the United States”) adopt the necessary measures to protect the rights of children and adults with disabilities at the Judge Rotenberg Educational Center (“the proposed beneficiaries”) located in Canton, Massachusetts. According to the request, the proposed beneficiaries face a situation of risk as a result of the treatments they are subjected to in this institution, which include the employment of electric shocks and body-restraining techniques, despite their specific conditions.

2. On November 20, 2018, the Commission requested information from the State in accordance with Article 25.5 of its Rules of Procedure, so that it may provide its observations within seven days, with no response having been received to date.

3. After analyzing the factual and legal allegations submitted by the applicants, the Commission considers that, from a *prima facie* perspective, the existence of a situation of serious risk to the rights of the proposed beneficiaries is duly justified, in light of the imminent possibility of facing harm of an irreparable nature. Consequently, the Commission requests that the United States: a) adopt the necessary measures to protect the rights to life and personal integrity of all the persons with disabilities who reside at the Judge Rotenberg Educational Center; particularly, by ensuring that the Center immediately ceases the use of any aversive measure, including the electro-convulsive therapies under the circumstances described in the present Resolution; b) consult and agree upon the measures to be taken with the proposed beneficiaries and their representatives; and c) adopt the measures necessary aimed at investigating the events that led to the adoption of this resolution in order to prevent their repetition.

II. SUMMARY OF ALLEGED FACTS AND ARGUMENTS

1. Information provided by the applicants

4. The proposed beneficiaries are all the children and adults with disabilities (a total of two hundred and forty) reportedly residing at the Judge Rotenberg Educational Center (“the Center”), an educational residency in Canton, Massachusetts, intended for persons mainly diagnosed with autism, post-traumatic stress disorder, schizophrenia, attention deficit disorder, obsessive-compulsive disorder, bipolar disorder, among others.

5. The request was submitted in order to report the use of electric shocks by the institution – the only one in the United States – as a form of punishment to discipline students who show “behavioral problems,” such as getting up from their seats, making noise, cursing or not following the orders of the

staff. These electric jolts, which are reportedly administered by using a mechanism called "Graduated Electronic Decelerator" (GED)¹ that is strapped to parts of the body such as the back, torso, arms, legs, hands and feet, carry a minimum power of 15.5 milliamps and a maximum of 45.5.² According to the applicants, to date, eighty students are being subjected to this treatment, receiving up to dozens of shocks in a day.³ This treatment is allegedly used, in some cases, along with other body-restraining methods (even to prevent the children from removing the GED), such as in the case of a child who remained strapped to a chair continually for almost two years.

6. According to the request, the Center justified the use of this measure by arguing that any human being is susceptible to respond to positive and negative stimuli in order to correct their behavior – they even had a reward system for those students who comply with the rules. As the institution authorities stated, any child, regardless of their medical diagnosis and history, may be subject to this treatment. The applicants, for their part, highlighted that the psychological treatments and supply of medication are virtually non-existent. In view of the above, the Center is presented as "the last resort" for many parents whose children have reportedly not been admitted to other institutions, with the families themselves expressing their "fervent support" for this program.

7. The applicants stated that a task force from the New York State Psychological Association analyzed the use of these "aversive" techniques in 2006 and, given the lack of scientific evidence on its effectiveness and safety as a treatment, expressed concern over the long-term effects it may have on their health, particularly of the students who receive various shocks in a day. The report also determined that "[s]ome of the techniques described as 'aversive behavioral interventions' not only constitute corporal punishment, but are included in literature on torture techniques," and recalled that the use of aversive techniques have been prohibited by federal agencies and professional organizations. According to the Association, these practices can create a risk of psychological trauma, marginalization and alienation. In this regard, the applicants enclosed a public video with some testimonies on the matter.⁴ Despite the aforementioned, a trial court determined in June 2018 that, in response to a lawsuit filed by the Massachusetts governor's office, it was not possible to demonstrate that the therapies implemented did not adhere to the recognized standard of care for individuals with intellectual and physical disabilities.⁵

8. On the dangerous nature of this method, the applicants referenced a report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of March 12, 2013, which alludes to the Center. On this point, the Rapporteur took into account several measures that had been taken by the State – such as warnings from the Food and Drug Administration, legal actions at both the state and federal levels, the introduction of normative changes prohibiting the use of Level III aversive techniques in all schools in Massachusetts (except for children whose treatment was reviewed by a judge prior to September 1, 2011), among others – but warned that the use of electric shocks

¹ The applicants alleged that the Center initially inflicted corporal punishment such as pinching, beatings and the use of helmets that battered the brain with inescapable white noise. As an alternative method, the Center reportedly started using electric shocks in the eighties. After verifying that the low intensity discharges were not effective – because the subjects could adapt to the pain –, the Center asked the supplier for a machine with greater capacity but, since the request was not accepted, they developed this new mechanism themselves. See: New England Center for Investigative Report, "Abuse claims persist for special needs school" (October 29, 2018), available at: <https://www.necir.org/2018/10/29/abuse-claims-persist-for-special-needs-school/>

² By way of comparison, the applicants indicated that the taser guns used by the police allegedly have between 3 and 4 milliamps.

³ On the visit of a psychologist to the Center on behalf of the New York State Department of Education, who was interviewed by the applicants on an unspecified date, the following was reportedly stated: "[t]he level of shock is unbelievable, very painful... No other class of citizen in the United States could be subjected to this. You could not do this to a convicted felon." For its part, the director of the Center himself allegedly described the shocks as "very painful."

⁴ See: https://www.youtube.com/watch?v=PO_J0J9c1bQ

⁵ The Independent, "Massachusetts school can continue using electric shocks on special needs students, judge rules" (July 3, 2018), available at: <https://www.independent.co.uk/news/world/americas/electric-shock-therapy-school-special-needs-children-massachusetts-judge-rotenberg-center-canton-a8429736.html>

persisted and that the revised regulations only protected incoming students. The Rapporteur also pointed out that, since there is no regulation at the federal level, the Center could simply move to a different state and continue with these practices, as it already had the opportunity to do so in California and Rhode Island. For this reason, after concluding that the rights of the children suffering from electrical shocks and level III aversive techniques in this Center had been violated according to the United Nations Convention against Torture and other international standards, the Rapporteur called on the United States to ensure a prompt and impartial investigation into these practices and take measures to prohibit them at the national level regarding any student, even those whose treatments had reportedly been reviewed by a judge before September 1, 2011 in Massachusetts.⁶

2. Response from the State

9. On November 20, 2018, the Commission requested information from the State in accordance with Article 25.5 of its Rules of Procedure, so that it may provide its observations within 7 days, with no response having been received to date.

III. ANALYSIS OF THE REQUIREMENTS OF SERIOUSNESS, URGENCY AND IRREPARABLE HARM

10. The precautionary measures mechanism is part of the Commission's function of monitoring Member State compliance with human rights obligations established in Article 106 of the Charter of the Organization of the American States ("OAS"), based upon Article 41 (b) of the American Convention on Human Rights ("American Convention"), and Article 18 (b) of the Statute of the IACHR. Moreover, the precautionary measures mechanism is described in Article 25 of the Rules of Procedure, by which the Commission grants precautionary measures in serious and urgent situations, where such measures are necessary to prevent an irreparable harm.

11. The Inter-American Commission and the Inter-American Court on Human Rights (hereinafter "the Inter-American Court" or "IAHR Court") have established repeatedly that precautionary and provisional measures have a dual nature, both precautionary and protective. Regarding the protective nature, these measures seek to avoid irreparable harm and to protect the exercise of human rights. Regarding their precautionary nature, the measures have the purpose of preserving legal situations while the bodies of the Inter-American System analyze a petition or case. Their objective and purpose are to ensure the integrity and effectiveness of an eventual decision on the merits, and, thus, avoid any further infringement of the rights at issue, a situation that may adversely affect the *effet utile* of the final decision. In this regard, precautionary or provisional measures allow the State concerned to comply with the final decision and, if necessary, implement the ordered reparations. For such purposes, according to Article 25(2) of the Rules of Procedure, the Commission considers that:

- a. "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the Inter-American System;
- b. "urgent situation" refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and
- c. "irreparable harm" refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.

⁶ UN, General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum, Observations on communications transmitted to Governments and replies received, 12 March 2013, A/HRC/22/53/Add.4, at 84. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-53-Add4_EFS.pdf

12. In analyzing those requirements, the Commission reiterates that the facts contained in a request for precautionary measures need not be proven beyond doubt; rather, the information provided ought to be assessed under a *prima facie* standard, so as to determine whether a serious and urgent situation exists.⁷

13. As a preliminary observation, the Commission deems it pertinent to recall that it is not called upon to determine through its mechanism of precautionary measures whether a violation to the rights protected by the American Declaration of the Rights and Duties of Man, or other applicable instruments, has occurred in this matter. Nonetheless, it is within the Commission's competence to assess whether the situation at hand presents an urgent and serious risk of irreparable harm.⁸

14. Pursuant to the Rules of Procedure, the element of seriousness refers to a "grave impact that an action or omission may have on a protected right [...]." When making this determination in the present matter, the Commission considers it pertinent to take into account the pronouncements made by various international bodies in relation to the use of the so-called GED, in light of the standards established in terms of protection of persons with disabilities.

15. In this regard, the Commission observes that in the situation described by the applicants, the proposed beneficiaries, who have different types of disabilities and are institutionalized, are allegedly subject to the application of certain types of aversive therapies, especially the supply of electric shocks by the authorities of the Center with the aim of "correcting" alleged behavioral deviations of the people interned there. Moreover, in certain cases, restraining methods are also combined. According to the information provided, in some cases the treatment has been applied dozens of times a day, and although it reportedly has different power ranges, it could nonetheless reach a considerable intensity (see *supra* para. 5).

16. The Commission notes that international law contains a series of obligations for States regarding the protection of the rights of persons with disabilities. In this respect, for example, the Convention on the Rights of Persons with Disabilities ("CRPD")⁹ establishes in its Article 3 as general principles: "[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons [...]"¹⁰ while Articles 12 and 25 recognize, respectively, the right to enjoy "[...] legal capacity on an equal basis with others in all aspects of life,"¹¹ including for example deciding where to reside and medical treatment,¹² and that all care provided must include their free and informed consent.¹³ In addition to the foregoing, and to the provisions of other applicable instruments,¹⁴ Article 15 provides for the prohibition of submission to torture or other cruel, inhuman or degrading treatment or punishment, while Article 19 establishes the right to live independently and to be included in the community.

⁷ In that regard, for instance, in relation to the provisional measures, the Inter-American Court has considered that this standard requires a minimum of details and information that allow for the *prima facie* assessment of the situation of risk and urgency. IACHR, *Matter of the children and adolescents deprived of their liberty in the "Complejo do Tatuapé" of the Fundação CASA*. Request for extension of precautionary measures. Provisional Measures regarding Brazil. Resolution of the Inter-American Court of Human Rights of July 4, 2006. Considerandum 23. Available in Spanish at http://www.corteidh.or.cr/docs/medidas/febem_se_03.pdf

⁸ See, *mutatis mutandis*: IACHR, *M.B.B.P. regarding Panama* (PM-490-18), Resolution 81/2018 October 15, para. 15, among others. Available in Spanish at: <http://www.oas.org/es/cidh/decisiones/pdf/2018/81-18MC490-18-PN.pdf>

⁹ This treaty has not been ratified by the United States.

¹⁰ Convention on the Rights of Persons with Disabilities, Article 3.

¹¹ *Id.*, Article 12.

¹² UN, General Assembly, Provisional Report of the Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment, July 28, 2008, A/63/175, para. 44. Available at: <https://www.ohchr.org/EN/Issues/Disability/Pages/UNStudiesAndReports.aspx>

¹³ CRPD, Article 25.

¹⁴ See: Convention against Torture; International Covenant on Civil and Political Rights, Article 7, both ratified by the United States.

17. With regard to the use of electro-convulsive therapies, Mr. Manfred Nowak, former Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment, issued a report in 2008 determining that:

[...] unmodified ECT may inflict severe pain and suffering and often leads to medical consequences, including bone, ligament and spinal fractures, cognitive deficits and possible loss of memory. It cannot be considered as an acceptable medical practice, and may constitute torture or ill-treatment. In its modified form, it is of vital importance that ECT be administered only with the free and informed consent of the person concerned, including on the basis of information on the secondary effects and related risks such as heart complications, confusion, loss of memory and even death.¹⁵

18. In 2013, the then Special Rapporteur on Torture and other cruel, inhuman and degrading treatment, Juan Méndez, when referring the situation of the United States in 2013, mentioned specifically the issue of children and youth at the residential program of “Judge Rotenberg,” in Canton, Massachusetts, expressing, among other aspects, a “great concern for the physical and mental integrity of the students that reside at JRC, given the continuous use of electric shock and physical means of restraints as part of its educational program [...]”¹⁶ Furthermore, the Special Rapporteur “determine[d] that the rights of the students of the JRC subjected to Level III Aversive Interventions by means of electric shock and physical means of restraints have been violated under the UN Convention against Torture and other international standards.”¹⁷

19. In view of the aforementioned context, the Commission observes that the situation presented by the applicants suggests a serious impact on the rights of the proposed beneficiaries, particularly on their right to personal integrity which may be subjected to a form of torture. In addition, when assessing the present situation, the Commission notices that the use of electric shocks and methods of restraint in the circumstances stated by the applicants would cause a differential and integral impact on several of the proposed beneficiaries’ rights, which, added to the dependency relationship in which they find themselves inside an institution, places them in a situation of even greater vulnerability. The Commission also points out that several of the proposed beneficiaries are still children, and that, in accordance with their best interests, the relevant authorities must ensure enhanced protection and guarantee the harmonious development of their personality.

20. As regards the previous scenario, the Commission regrets the lack of response from the United States to the request made in this proceeding, which effectively prevents it from learning the State’s observations on the alleged situation. In this context, the Commission has not received information on the aspects that were required, which include, among others, the reasons for which these individuals are being institutionalized as well as the assessment made in each case in relation to the use of said therapy.

21. Taking the foregoing into consideration, the Commission observes that from a *prima facie* perspective, the application of GED in the specific circumstances of the present matter is susceptible to seriously affect the proposed beneficiaries’ rights.

22. Regarding the requirement of urgency, the Commission considers that it is also complied with, to the extent that children and adults at present continue to be subjected to this treatment, the

¹⁵ See note 10, para. 61.

¹⁶ UN, General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum, Observations on communications transmitted to Governments and replies received, 12 March 2013, A/HRC/22/53/Add.4, para. 149.

¹⁷ UN, General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Addendum, Observations on communications transmitted to Governments and replies received, 12 March 2013, A/HRC/22/53/Add.4, párr. 149.

dangerous nature of which has already been demonstrated on previous occasions by other international mechanisms. Additionally, and in view of the lack of response from the State, there is not enough available information to guarantee that the Center does not repeat such practices in other localities, as was highlighted by former Rapporteur Méndez. In effect, the Commission understands that several of the proposed beneficiaries could be under such conditions for extended periods of time, which requires the adoption of immediate measures to safeguard their rights.

23. As regards the requirement of irreparable harm, the Commission considers that it is met, to the extent that the potential impact on the rights to life and personal integrity constitutes the maximum situation of irreparability. Furthermore, the Commission takes into account, from an integral perspective, the potential suffering that the proposed beneficiaries would have to endure due to the use of this technique under the present circumstances and while they are being institutionalized. In addition to the possible physical and psychological consequences, this situation is susceptible to perpetuate or increase barriers or limitations to the proposed beneficiaries' ability to effectively exercise multiple rights.

IV. BENEFICIARIES

24. The Commission declares that the beneficiaries of the present precautionary measure are all the persons with disabilities residing at the Judge Rotenberg Educational Center.

V. DECISION

25. In view of the abovementioned, the Commission considers that this matter meets *prima facie* the requirements of seriousness, urgency and risk of irreparable harm set forth in Article 25 of its Rules of Procedure. Consequently, the Commission requests that the United States:

- a) adopt the necessary measures to protect the rights to life and personal integrity of all the persons with disabilities who reside at the Judge Rotenberg Educational Center; particularly, by ensuring that the Center immediately ceases the use of any aversive measure, including the electro-convulsive therapies under the circumstances described in the present Resolution;
- b) consult and agree upon the measures to be taken with the proposed beneficiaries and their representatives; and
- c) adopt the necessary measures aimed at investigating the events that led to the adoption of this resolution in order to prevent their repetition.

26. The Commission also requests that the Government of the United States inform the Commission within a period of 15 days, as from the date of notification of the present resolution, on the adoption of the precautionary measures that have been agreed upon and to periodically update this information.

27. The Commission highlights that, in conformity with Article 25(8) of its Rules of Procedure, the granting of precautionary measures and their adoption by the State do not constitute a prejudgment on the possible violation of rights safeguarded in the American Declaration and other applicable instruments.

28. The Commission instructs its Executive Secretariat to notify the United States and the applicants of the present resolution.

29. Approved on December 3, 2018 by: Margarette May Macaulay, President; Esmeralda Arosemena de Troitiño, First Vice-President; Luis Ernesto Vargas Silva, Second Vice-President; Francisco José Eguiguren Praeli; Joel Hernández García; Antonia Urrejola and Flávia Piovesan, members of the IACHR.



Marisol Blanchard
Chief of Staff of the Executive Secretariat